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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1977

[Docket Number: OSHA-2021-0002]

RIN 1218-AD35

Discrimination against Employees Exercising Rights under the Williams-Steiger Occupational Safety and Health Act of 1970

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final interpretive rule.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is amending one of the rules interpreting the anti-retaliation provision of the Occupational Safety and Health Act of 1970 (OSH Act or Act) to clarify that the test for showing a nexus between protected activity and adverse action is "but-for" causation.

DATES: This final interpretive rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Rob Swick, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor; telephone: (202) 693-2199; email: *OSHA.DWPP@dol.gov*.

SUPPLEMENTARY INFORMATION: OSHA is revising the interpretive rule at 29 CFR 1977.6(b), which addresses causation under the anti-retaliation (colloquially "whistleblower") provision of the OSH Act, section 11(c), 29 U.S.C. 660(c). For the reasons explained in the following sections, the agency is removing outdated language to clarify that the only means by which the Secretary of Labor (Secretary) may prove a causal connection between protected activity and adverse action under the OSH Act is to

show that "but for" the protected activity the employee would not have suffered the adverse action.

I. Background.

Congress enacted the OSH Act, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. 29 U.S.C. 651(b). To achieve this goal, Congress authorized the Secretary, among other things, to set and enforce occupational safety and health standards. The Secretary's assigned enforcement powers, including the power to inspect workplaces and issue citations and notifications of proposed penalties to employers who violate the standards developed under the OSH Act, have been delegated to OSHA. 29 U.S.C. 657(a), 658, 666; Secretary of Labor's Order No. 08-2020 (85 FR 58393, September 18, 2020).

In addition, the Act affords employees and their representatives certain rights. For example, section 8(f)(1) of the Act provides employees and representatives of employees who believe that a violation of a safety or health standard that threatens physical harm exists or that an imminent danger exists with the right to request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. 29 U.S.C. 657(f)(1). Such employee complaints aid the agency in accomplishing the goal of assuring safe and healthful working conditions by alerting the agency to potential hazards that may not have been otherwise discovered and, thus, allowing those hazards to be corrected.

Congress also included an anti-retaliation (colloquially "whistleblower") provision in the Act to protect individual employees from retaliation for reporting safety deficiencies or participating in OSH Act proceedings. 29 U.S.C. 660(c)(1). This provision, which is included in section 11(c)(1), provides that no person may discharge or otherwise discriminate—in other words, take an adverse action—against any employee

"because" such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the Act, or has testified or was about to testify in any such proceeding, or because of the exercise by such employee on behalf of himself or herself or others of any right afforded by the Act. 29 U.S.C. 660(c)(1).

Section 11(c)(2) contains the remedies for any such retaliation. Specifically, section 11(c)(2) provides that if an employee believes that they have been discharged, or otherwise discriminated against, in violation of section 11(c)(1), such an employee may file a complaint with the Secretary. 29 U.S.C. 660(c)(2). The Secretary, upon receipt of such a complaint, "shall cause such investigation to be made as he deems appropriate," and if upon investigation, the Secretary determines that section 11(c) has been violated, the Secretary shall bring suit in district court against any person who discharges or discriminates against any employee for the exercise of protected rights under the OSH Act. 29 U.S.C. 660(c)(2). Section 11(c)(2) also provides district courts with jurisdiction over such actions and empowers them for cause shown to "order all appropriate relief, including rehiring or reinstatement of the employee to his or her former position with back pay." 29 U.S.C. 660(c)(2).

In 1973, OSHA issued rules implementing and interpreting section 11(c). 38 FR 2681 (Jan. 29, 1973). The rules were published in 29 CFR part 1977. Their purpose was to make available in one place interpretations of section 11(c) which guide the Secretary in carrying out the provision unless and until otherwise directed by authoritative decisions of the courts, or concluding, upon reexamination of an interpretation, that it is incorrect. 29 CFR 1977.2.

As noted above, section 11(c) protects employees from retaliation, i.e., adverse action, for engaging in certain delineated activities. See 29 CFR 1977.3 (listing activities protected by section 11(c)). Those activities are known as "protected activities." However, as discussed in 29 CFR 1977.6(a), adverse actions taken by an employer may

be predicated upon "nondiscriminatory grounds" and such actions would not necessarily violate section 11(c). Or, put another way, section 11(c) of the OSH Act does not prohibit an employer from discharging or disciplining an employee for engaging in "unprotected activities," i.e., discharge or discipline for "legitimate reasons" or "non-prohibited considerations." See 29 CFR 1977.6(a).

Section 1977.6(b) recognizes that an employer's adverse action against an employee may have more than one cause. For example, an employer's termination of an employee may be motivated in part by the employee's complaint about an unsafe workplace condition and in part by the employee's poor work performance. As stated in section 1977.6(b), an employer's mixed motivation for an adverse action does not necessarily invalidate an employee's section 11(c) complaint. See 29 CFR 1977.6(b) ("[T]o establish a violation of section 11(c), [a]n employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action.").

Section 1977.6(b) provided two ways in which a causal connection between protected activity and adverse action could be established: (1) if protected activity was a substantial reason for the adverse action; or (2) if the adverse action would not have taken place "but for" engagement in protected activity. In support of this two-pronged test, the regulation cited two court of appeals decisions finding violations of the whistleblower provision of the Fair Labor Standards Act, 29 U.S.C. 215(a)(3), prohibiting discharge or other discrimination against an employee "because" such employee has filed a complaint under or related to that statute or engaged in related protected activities. *Mitchell v. Goodyear Tire & Rubber Co.*, 278 F.2d 562, 565 (8th Cir. 1960) (employee would not have been fired "but for" his complaint to the Wage-Hour Division); *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152 (5th Cir. 1962).

Since the issuance of the section 11(c) interpretive rules in 1973, the test under other statutes for determining whether an adverse action occurred "because of" a

protected activity, i.e., the causation test, has gone through a number of changes. In 2009, the Supreme Court considered the causation test under the Age Discrimination in Employment Act (ADEA), which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age." 29 U.S.C. 623(a); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). In so doing, the Court explained that the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. Therefore, the Court held that to establish a disparate treatment claim under the plain language of the ADEA, the plaintiff had to prove that age was the "but for" cause of the employer's adverse action; the burden of persuasion does not shift to the employer to show that it would have taken the same action regardless of age. *Gross*, 557 U.S. at 175-77, 180.

The *Gross* decision was followed in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). In that case, the Supreme Court interpreted the anti-retaliation provision of Title VII, which bans discrimination against an employee "because" he or she has opposed any practice made unlawful by Title VII or engaged in related activities. In the decision, the Court relied first on the default rule in tort law which applies absent contrary statutory language, i.e., that a plaintiff must show that but for the defendant's conduct the harm would not have occurred. *Nassar*, 570 U.S. at 348, 350. The Court then reiterated what it had held in *Gross*—that the ordinary meaning of the word "because of" means that the plaintiff must prove but-for causation. Id. at 350. It emphasized that although *Gross* concerned an interpretation of the ADEA, it had some persuasive force because of its textual basis and the concern in both cases with the meaning of the word "because." Id. at 351. Therefore, the Court held that because there was no meaningful difference between the text in the ADEA and that in the Title VII anti-retaliation

provision, the proper conclusion, as in *Gross*, is that the Title VII anti-retaliation provision requires a showing of but-for causation. Id. at 352.

The Supreme Court has continued to apply the "but for" formulation as the proper test for causation for a variety of statutes in which causation is an element. For example, most recently, in *Bostock v. Clay County, Georgia*, 140 S. Ct. 1731, 1739 (2020), the Supreme Court held that the phrase "because of" means but-for causation and then offered more direction on the meaning of the but-for causation standard. The dispute in *Bostock* arose under Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, "because of" such individual's race, color, religion, sex, or national origin. 42 U.S.C. 2000e–2(a)(1). Citing *Nassar*, the Supreme Court reiterated that Title VII's "because of" test incorporates the "simple" and "traditional" standard of but-for causation. *Bostock*, 140 S. Ct. at 1738. The Court explained that but-for causation is established whenever a particular outcome would not have happened "but for" the purported cause. Id. at 1739 (citing *Gross*, 557 U.S. at 176). Put another way, the Court added, the but-for causation test "directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." Id. at 1739. Importantly, the Court made clear that events *often* have multiple but-for causes. Id. The but-for causation test does not require that the prohibited factor be the sole or primary reason for the adverse action. Id.

Federal courts of appeals have followed *Nassar* and *Gross* in applying the but-for causation test under other statutes using the word "because." See, e.g., *Lestage v. Coloplast Corp.*, 982 F.3d 37, 46 (1st Cir. 2020) (joining the Third, Fourth, Fifth, and Eleventh Circuit Courts of Appeals in holding that the False Claims Act's prohibition against discriminating against an employee "because of" that employee's protected conduct is a but-for standard); *Natofsky v. City of New York*, 921 F.3d 337, 347-50, 348

(2d Cir. 2019), cert. denied, 140 S. Ct. 2668 (2020) (holding that the Rehabilitation Act incorporates by reference the Americans with Disabilities Act's (ADA) "but-for" causation standard; "*Gross* and *Nassar* dictate our decision here."); *Acosta v. Brain*, 910 F.3d 502, 514 (9th Cir. 2018) (assuming, without deciding, that the but-for causation standard applies to cases under section 510 of the Employee Retirement Income Security Act, which uses the word "because").

As noted above, section 11(c)(1) of the OSH Act provides that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has" engaged in certain protected activities. 29 U.S.C. 660(c)(1). After the *Nassar* decision, OSHA recognized that the correct causation standard under this provision would be "but-for." Therefore, OSHA included the but-for causation standard in the 2016 revision to the *Whistleblower Investigations Manual* (*WIM*).[1] See *https://www.whistleblowers.gov/manual*. Specifically, the agency revised the *WIM* to require that in a section 11(c) case OSHA must have reasonable cause to believe that the employer would not have carried out the adverse action "but for" the protected activity (Chapter 3 par. V.B.i.).

Similarly, OSHA included the but-for causation standard in the 2018 *OSHA Fact Sheet, Filing Whistleblower Complaints under Section 11(c) of the OSH Act of 1970*. See *https://www.osha.gov/Publications/OSHA3812.pdf.* The *Fact Sheet* states that a person taking adverse action against an employee may be found to have violated section 11(c) if the employee would not have experienced the adverse action "but for" protected activity. OSHA's *Investigator's Desk Aid to the Occupational Safety and Health Act (OSH Act) Whistleblower Provision*, issued in 2019, also states that the Secretary has the burden of

[1] The *WIM* outlines procedures, and other information relative to the handling of retaliation complaints under the various whistleblower statutes delegated to OSHA.

proving but-for causation in a section 11(c) case. See *https://www.osha.gov/sites/default/files/11cDeskAid.pdf*.

Discussion of Update to 29 CFR 1977.6(b)

This final interpretive rule updates OSHA's 1973 section 11(c) interpretive rule at 29 CFR 1977.6(b) to bring it in line with the Supreme Court's holdings in *Gross*, *Nassar*, and *Bostock.* Prior to this rule, the provision had not yet been updated to reflect the newer causation test compelled by the Supreme Court; until the revision in this rule, the interpretive rule stated in part that if protected activity was merely a "substantial reason" for the adverse action, section 11(c) has been violated. That interpretation is not in alignment with *Gross*, *Nassar*, and *Bostock*, and it is inconsistent with OSHA's policy documents stating (on the basis of *Nassar*) that but-for causation must be shown to prove a section 11(c) violation.

To bring the interpretive rule in line with Supreme Court precedent and OSHA's current interpretation, the agency is revising § 1977.6(b) in three ways. First, and most importantly, this rule revises the second sentence of the provision by removing the "substantial reason" language. As explained above, that sentence previously provided two ways in which a causal connection between protected activity and adverse action could be established in mixed motive cases: (1) if protected activity was a substantial reason for the adverse action; or (2) if the adverse action would not have taken place "but for" engagement in protected activity. By removing the "substantial reason" option, OSHA is clarifying that to prevail in a section 11(c) case the Secretary must show that but for the protected activity the employee would not have suffered the adverse action.

Second, this rule deletes the citations to the two cases that appeared after the previous second sentence (*Mitchell v. Goodyear Tire & Rubber Co.*, 278 F.2d 562, 565 (8th Cir. 1960) and *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152 (5th Cir. 1962)) and the parenthetical accompanying the reference to *Mitchell* and replaces those cases with

citations to *Bostock* (*Bostock v. Clay County, Georgia*, U.S., 140 S. Ct. 1731, 1739 (2020)) and *Nassar* (*Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)). Deleting the references to the older cases should reduce the chance of any confusion about the appropriate causation standard. In addition, the updated citations should help employers and other stakeholders easily access information about the relevant causation standard should they wish to know more.

Third, this rule amends the first sentence of § 1977.6(b) by adding the words "or primary" before the word "consideration." Prior to this change, that sentence stated: "At the same time, to establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action." Adding "or primary" further emphasizes the Supreme Court's holdings and reflects the language in *Bostock* that the protected factor need not be the primary reason for the adverse action. See *Bostock*, 140 S. Ct. at 1739.

In addition, OSHA is making one clarifying change to the last sentence of 29 CFR 1977.6(b), which is unrelated to the issues regarding the but-for causation standard. The previous version of that sentence stated that the issue as to whether a "discharge" was because of protected activity will have to be determined on the basis of the facts in the particular case. This rule revises that sentence to add the words "or other adverse action" to reflect the full scope of section 11(c)'s prohibition against retaliation.

OSHA notes that these changes do not affect the interpretation in 29 CFR 1977.6(b) that the employee's engagement in protected activity need not be the sole consideration for the adverse action in order for a violation of section 11(c) to be established. That language is consistent with *Bostock*. See 140 S. Ct. at 1739. Likewise, this revision does not affect any of the whistleblower provisions of other statutes

enforced by OSHA that have special language on the proof of causation in clarifying the word "because."[2]

II. Paperwork Reduction Act

This rule does not require any collection of information within the meaning of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

III. Administrative Procedure Act

The notice and comment rulemaking procedures of 5 U.S.C. 553, a provision of the Administrative Procedure Act (APA), do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A). This rule is an interpretive rule compelled by Supreme Court case law. Therefore, publication in the *Federal Register* of a notice of proposed rulemaking and request for comments was not required. Furthermore, because this rule is interpretive, rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the *Federal Register* is inapplicable.

IV. State Plans

Pursuant to section 18 of the Act, 29 U.S.C. 667, a State may assume responsibility for the promulgation and enforcement of occupational safety and health standards relating to any issue with respect to which a Federal standard has been promulgated if OSHA approves a plan submitted by the State. To be approved, the State Plan must provide for standards, and the enforcement of those standards, which are at least as effective as Federal OSHA standards and enforcement. 29 U.S.C. 667(c)(2). One of the mandatory criteria for "at least as effective" enforcement is a provision, similar to

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[2] OSHA enforces other whistleblower provisions under which a violation is proved if it has been shown by a preponderance of the evidence that protected activity was a contributing factor in the adverse action, but relief may not be ordered if the respondent demonstrates by clear and convincing evidence that the adverse action would have been taken in the absence of the protected activity. An example of one of these provisions is the whistleblower provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). The specific language on causation is set forth at 49 U.S.C. 42121(b)(2)(B)(iii) and (iv).

section 11(c), for necessary and appropriate protection to an employee against discharge or discrimination because the employee has filed a complaint, testified, or otherwise acted to exercise rights under the Act for himself or herself or others. 29 CFR 1902.4(c)(2)(v) and 1956.11(c)(2)(v). This provision must be enforced at least as effectively as Federal OSHA enforces section 11(c). 29 CFR 1902.3(d) (provisions of a State Plan must be enforced as effectively as Federal OSHA enforces analogous provisions); 29 CFR 1956.10(d) (similar provision for State Plans which cover only State and local government employees).

OSHA is revising the interpretive rule regarding the causal connection between an employee's protected activity and the discharge or other adverse action needed to establish a violation of section 11(c) of the OSH Act. This revised interpretive rule (interpreting the word "because" in section 11(c) to mean "but for" causation) is narrower than OSHA's prior interpretive rule (which merely required that the protected activity be a "substantial reason" for the adverse action). A State Plan, acting under State law, is not obligated to follow the causation test adopted by the United States Supreme Court in interpreting Federal statutes. Thus, a State Plan would not be required to adopt this change in order to remain at least as effective as Federal OSHA. The State's test for establishing causation under the occupational safety and health anti-retaliation provision must not be less effective than the Federal "but for" causation test that this rule establishes. Thus, the State Plan test cannot further narrow the causation requirement beyond "but for" causation.

Of the 28 States and territories with OSHA-approved State Plans, 22 cover State and local government, as well as private-sector, employees: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. The remaining five states and one

territory cover only State and local government employees: Connecticut, Illinois, Maine, New Jersey, New York, and the Virgin Islands.

V. Federalism

The agency reviewed this rule in accordance with the most recent Executive order on Federalism, Executive Order 13132, which requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States before taking actions that would restrict States' policy options, and take such actions only when clear constitutional authority exists and the problem is of national scope (64 FR 43255). The final rule involves an interpretive regulation issued under sections 8 and 11 of the OSH Act (29 U.S.C. 657, 660) and not an "occupational safety and health standard" issued under section 6 of the OSH Act (29 U.S.C. 655). Therefore, pursuant to section 18 of the OSH Act (29 U.S.C. 667(a)), the rule does not preempt state law. The effect of the final rule on State Plans is discussed in section IV, State Plans.

VI. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995

The Department has concluded that this rule is not a "significant regulatory action" within the meaning of section 3(f)(4) of Executive Order 12866, as reaffirmed by Executive Order 13563, because it is not likely to: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis has been prepared.

OSHA has also determined that this interpretive rule will not impose costs of more than $100 million per year and is not a significant regulatory action within the meaning of section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532 and does not meet the definition of a "Federal intergovernmental mandate" within the meaning of section 421(f) of the UMRA (2 U.S.C. 658(5)).

VII. Regulatory Flexibility Analysis

The notice and comment rulemaking procedures of section 553 of the APA do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A). Rules that are exempt from APA notice and comment requirements at 5 U.S.C. 553 are also exempt from the Regulatory Flexibility Act (RFA) (see 5 U.S.C. 604(a); Small Business Administration Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, at 9; also found at *https://www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act*). This is a rule of agency interpretation within the meaning of 5 U.S.C. 553 and therefore is exempt from both the notice and comment rulemaking procedures of the APA and the requirements of the RFA.

List of Subjects in 29 CFR Part 1977

Administrative practice and procedure, Employment, Investigations, Safety, Whistleblowing

Authority and Signature.

James S. Frederick, Acting Assistant Secretary for Occupational Safety and Health, authorized the preparation of this document under the authority granted by Secretary's Order 08-2020 (May 15, 2020).

Signed at Washington, D.C.

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James S. Frederick,
Acting Assistant Secretary for Occupational Safety and Health.

For the reasons stated in the preamble, OSHA amends part 1977 of chapter XVII of title 29 as follows:

PART 1977—[AMENDED]

1. Revise the authority citation for part 1977 to read as follows:

Authority: 29 U.S.C. 657, 660; 5 U.S.C. 553; and Secretary of Labor's Order No. 08-2020 (85 FR 58393), 9-83 (48 FR 35736), or 12-71 (36 FR 8754), as applicable.

2. In § 1977.6, revise paragraph (b) to read as follows:

§ 1977.6 Unprotected activities distinguished

* * * * *

(b) At the same time, to establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole or primary consideration behind discharge or other adverse action. If the discharge or other adverse action would not have taken place "but for" engagement in protected activity, section 11(c) has been violated. See *Bostock v. Clay County, Ga*., 140 S. Ct. 1731, 1739 (2020); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). Ultimately, the issue as to whether a discharge or other adverse action was because of protected activity will have to be determined on the basis of the facts in the particular case.

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